In the High Court of South Africa
(Western Cape Division, Cape Town)

Case No: 16226/17

In the matter between

REGARD DU TOIT	Applicant
and	
BENAY SAGER (NCRD2484) T/A DEBT BUSTERS	First Respondent
HTN ATTORNEYS C/O BOODLE INSTANT LOANS	Second Respondent
CONSUMER FRIEND C/O FOSCHINI RETAIL GROUP	Third Respondent
GET BUCKS (PTY) LIMITED	Fourth Respondent
HOPON LOANS	Fifth Respondent
WESBANK LIMITED C/O TOYOTA FINS SERVICES	Sixth Respondent
LANDAU ATTORNEYS C/O WONGA FINANCE	Seventh Respondent

JUDGMENT DELIVERED ON 17 NOVEMBER 2017

THULARE AJ

INTRODUCTION

[1] The applicant approached this court to be declared no longer over-indebted and no longer under debt review, that the credit bureaux remove the debt review status from his credit reports and that the debt counsellor provide the Form 17.W in terms of the National Credit Act 34 of 2005 (the NCA) confirming that he has been

declared no longer over-indebted. The application was served on the respondents, but it was unopposed.

THE FACTS

[2] In November 2016 the applicant applied to the first respondent, a debt counsellor, to be declared over-indebted in terms of s 86(1) of the NCA. The first respondent accepted the application and issued notices to advise the credit providers, the second to the seventh respondent, of that acceptance, as well as all registered credit bureaux. No court order was sought and none was made in respect of the debt review.

[3] The applicant alleges that he has now settled all debts he had with the respondents, except his instalment sale agreement with the sixth respondent. He alleges that his financial circumstances have significantly improved. He advised the first respondent of his wish to terminate the debt review process and to pay his creditors directly. The first respondent is unable to help, as in terms of the National Credit Regulator's Guidelines, a debt counsellor does not have the statutory powers to terminate or withdraw the debt review process. The applicant urges the court to intervene as his credit status will continue to reflect that he is still under debt review even if he is no longer over-indebted and can afford to pay his creditors directly. According to him, no creditor will suffer any prejudice.

[4] The first respondent is unwilling to make an assessment of the applicant's position even though he is still listed as the applicant's debt counsellor. According to the first respondent, the applicant's debt review process had been suspended in March 2017 due to the applicant's non-cooperation which involves non-payment of

the debt counseling aftercare fee. The first respondent does not have the resources to help the applicant as he is no longer an active client.

[5] The issue is whether the High Court should intervene where the consumer has applied to be declared over-indebted; where the application was accepted by the debt counsellor and the credit bureaux and creditors accordingly advised; but the proposal never made it to a Magistrate's Court for an order for rearrangement of the consumer's obligations; and the consumer seeks a removal of his or her record of debt adjustment from the national register and all registered credit bureau, but has not satisfied all the obligations under every credit agreement that was subject to that debt re-arrangement; and the debt counsellor decided not to issue or failed to issue a clearance certificate in terms of section 71 of the NCA.

[6] Mr Rogowski who appeared as counsel for the applicant, argued that the court must use its inherent jurisdiction to make the order in the terms sought in the notice of motion. He argued that there are circumstances where a person has not paid off all their debts and therefore cannot get a clearance certificate but they are however no longer over-indebted. It is his argument that the NCA does not make provision for such instances and as a result it is a lacuna in which this court is asked to intervene to prevent injustices. Relying on the Withdrawal Guidelines 002/2015 issued by the National Credit Regulator (NCR), it was further argued that the circumstances are such that the only option available to the applicant is a court order to declare that he is no longer over-indebted.

[7] Mr Rogowski drew my attention to the unreported judgment of Savage J dated 3 August 2017 in *Daniels and Another v Sensational Debt Relief (Pty) Ltd and*

Others under case number 10065/17. I agree with Savage J, as held in paragraph 13, that the NCA "does not expressly empower the Magistrate's Court to declare a consumer no longer over-indebted after a s 86(1) application has been filed and Form 17.2 has been issued, where the consumer has settled liabilities to the point that he or she is no longer over-indebted, in circumstances in which the court has not declared the consumer over-indebted or placed the consumer under debt review."

[8] Counsel further drew my attention to the unreported judgment of Neukircher AJ dated 25 October 2016 in the Gauteng Division, sitting in Pretoria in *Mgadze v Adcap, Ndlovu v Koekemoer* (57186/2016) [2016] ZAGPPHC 115 (2 November 2016). In my view, the consequence of a clearance certificate issued by a debt counsellor is the removal of the record of debt adjustment from the records of the national credit register and the credit bureau. This is clear from section 71(5) of the NCA, which appears later in this judgment.

[9] There are different paths of travel, in my view, that a person aggrieved by a report to a credit bureau and its holding of information in which he had applied and had been accepted by a debt counsellor to be placed under review, may approach the Tribunal or the Magistrate's Courts.

[10] In the first path, the applicable provisions of section 71 read as follows:

"71. ***Removal of record of debt adjustment or judgment***

(1) A consumer whose debts have been re-arranged in terms of Part D of this Chapter, must be issued with a clearance certificate by a debt counselor within seven days after the consumer has-

(a) satisfied all the obligations under every credit agreement that was subject to that debt re-arrangement order or agreement, in accordance with that order or agreement; or

(b) demonstrated-

(i) financial ability to satisfy the future obligations in terms of the re-arrangement order or agreement under-

(aa) a mortgage agreement which secures a credit agreement for the purchase or improvement of immovable property; or

(bb) any other long term agreement as may be prescribed;

(ii) that there are no arrears on the re-arranged agreements contemplated in subparagraph (i); and

(iii) that all obligations under every credit agreement included in the re-arrangement order or agreement, other than those contemplated in subparagraph (i), have been settled in full.

. . .

(3) If a debt counsellor decides not to issue or fails to issue a clearance certificate as contemplated in subsection (1), the consumer may apply to the Tribunal to review that decision, and if the Tribunal is satisfied that the consumer is entitled to the certificate in terms of subsection (1), the Tribunal may order the debt counsellor to issue a clearance certificate to the consumer.

. . .

(5) Upon receiving a copy of a clearance certificate, a credit bureau, or the national credit register, must expunge from its records –

(a) the fact that the consumer was subject to the relevant debt re-arrangement order or agreement;

(b) any information relating to any default by the consumer that may have –

(i) precipitated the debt re-arrangement; or

(ii) been considered in making the debt re-arrangement order or agreement; and

(c) any record that a particular credit agreement was subject to the relevant debt re-arrangement order or agreement."

[11] This is the path, the applicant started to walk. The applicant approached the debt counsellor for a clearance certificate in terms of s 71(1)(b). The first respondent

decided not to issue the applicant with the clearance certificate. According to correspondence from the first respondent, attached to an affidavit filed by Amukelani Mabasa employed by Campbell Attorneys on behalf of the applicant, the reason for the position adopted by the first respondent to this application is because the first respondent has suspended provision of service due to non-cooperation by the applicant in that fees payable by the applicant to the first respondent remain unpaid. In my view, this is not a matter nor is it circumstances in which the inherent jurisdiction of the High Court should be visited upon. The applicant should simply have followed through on the path he has commenced. This is a matter where the applicant may apply to the Tribunal to review the decision of the first respondent.

[12] There is, in my view, another second path for the removal of the record of the debt adjustment which was available to the applicant. In this path, available to the applicant under the statute, s 72(1)(c) of the NCA provides as follows:

*"72 **Right of access and challenge credit records and information***

(1) Every person has a right to-

(c) challenge the accuracy of any information concerning that person –

(i) that is the subject of a proposed report contemplated in paragraph (a); or

(ii) that is held by the credit bureau or national credit register, as the case may be,

and require the credit bureau or National Credit Regulator, as the case may be, to investigate the accuracy of any challenged information, without charge to the consumer; …"

[13] *The Concise Oxford English Dictionary*, revised tenth edition, Oxford University Press defines "held" as "past and past participle of hold". It defines "hold" as amongst others "keep in a specified position", "continue to follow (a course)" and "stay or cause to stay at a certain value or level". In my view, in s 72(1)(c) the Legislature recognised that there would be instances where information in an adverse report contemplated to be made against a person, would not warrant a

challenge. The Legislature acknowledged that there could be reasons, some time after the report was made but whilst being held by the credit bureau, that call for a challenge to the information to continue to stay or be kept in the original position. It is this acknowledgement, in my view, that informed the provision for the alternative, in respect of time, from the contemplation of a proposed report to the time during which that report is held. This is how, in my view, s 72(1)(c)(ii) is to be purposively interpreted and understood, following section 72(1)(c)(i). There is nothing in the terms of this section, in my view, which suggests that 72(1)(c(ii) only refers to instances where the adverse report came to the knowledge of the complainant for the first time after the information was already listed.

[14] In my view, the notification by a debt counsellor to all credit providers listed in the application and every registered credit bureau in terms of section 86(4), of his or her receipt of an application by a consumer to have the consumer declared over-indebted, is not the equivalent of a judgment of a court. The Legislature has provided that such notification may be removed by the credit bureau upon receipt of a clearance certificate issued by a debt counsellor [s 71(5)]. The issue of a clearance certificate by a debt counsellor, is not a withdrawal of the debt review in the sense discussed in the judgment of Nobanda AJ in the South Gauteng Division sitting in Johannesburg in *Rougier v Nedbank Ltd* (27333/2010) [2013] ZAGPJHC 119 (28 May 2013).

[15] In my view, entries of adverse reports by the credit bureau are not final and unalterable by such credit bureau at the moment of their enrolment. They can be varied and rescinded at any time on the presentation of credible information. At any point in time where the financial position of a person demonstrates a substantial

change, good reason exists for a just and equitable adjustment of his or her credit profile by the credit bureau and a commensurate report should be attributed to such person as soon as the credit bureau receives such information.

[16] There is a duty on the credit bureau, once the information it held is challenged, to take reasonable steps to seek evidence in support of the challenged information and then to do either of two things: to provide a copy of the evidence upon which its report relies to the aggrieved person, or to remove the information and all record of it from its files if it is unable to find credible evidence in support of its information [s 72(3)]. Where the credit bureau does not remove the information, the person who challenged the information may apply to the NCR to investigate the disputed information as a complaint under s 136, [s 72(4)]. The credit bureau may not report information that is challenged until the challenge has been resolved in terms of s 72(3), [s 72(5)].

[17] There is a third path that the applicant could have followed. S 13(a) and s 15(a) and (i) lists the responsibility and the enforcement functions of the NCR. S 13(a) provides:

*"**Development of accessible credit market***

13. The National Credit Regulator is responsible to-

(a) promote and support the development, where the need exists, of a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry to serve the needs of-

(i) historically disadvantaged persons;

(ii) low income persons and communities; and

(iii) remote, isolated or low density populations and communities,

in a manner consistent with the purposes of this Act;

[18] Whilst, s 15(a) and (i) sets out the enforcement functions as:

*"**Enforcement functions of National Credit Regulator***

15. The National Credit Regulator must enforce this Act by –

(a) promoting informal resolution of disputes arising in terms of this Act between consumers on the one hand and a credit provider or credit bureau on the other, without intervening in or adjudicating any such dispute;

. . .

(i) referring matters to the Tribunal and appearing before the Tribunal, as permitted or required by this Act;"

[19] Once a person applies to the NCR to investigate the disputed information as a complaint in terms of section 136, as provided for in terms of s 72(4), there is a duty on the NCR to investigate the complaint [s 137 read with s 139 and s 140]. In my view, where it is found that the circumstances of the complainant have changed to such an extent that the adverse entry on his credit profile that he is over-indebted and under debt review can no longer be sustained by the true facts, the NCR and the credit bureau, and any other party involved, may resolve the matter and have the terms of their agreement made an order. Such order by consent may be presented to the Tribunal (s 140 read with s 138) or the Magistrate's Courts [s 138]. Where the NCR issues a notice of non-referral in response to a complaint other than a complaint in respect of protection against discrimination in respect of credit, the complainant may refer the matter to the Tribunal or the consumer court [s 141]. Where the complaint was heard by a single member of the Tribunal, relief may be sought from the full panel. It is a decision of the full panel that is reviewable or appealable to the High Court in terms of section 148.

[20] The applicant seems to hold the view that the issuing of a clearance certificate involves nothing more than the mere formality of the filling in of a one page NCR Form 19 containing eight questions. What appears to escape the applicant is that he has amongst others to demonstrate financial ability to satisfy future obligations in terms of the re-arrangement order under outstanding agreements, as but one example. This demonstration, includes an in-depth study of his last three documented proof of income as well as his last three months bank statements, wherein his expense patterns and tendencies are assessed, as part of the prescribed criteria to conduct the affordability assessment on the existing financial means and prospects as set out in Regulation (R) 23A(3) and (4) of the Regulations made in terms of the NCA. Part of the assessment of the financial obligations include a consideration of the statutory deductions and minimum living expenses in order to arrive at a net income, which must be allocated for payment of debt instalments [R 23(8) and (9)]. This duty of the debt counsellor who has to issue a clearance certificate is set out in s 71(2) as part of the assessment by the debt counsellor that the consumer has demonstrated what the NCA expects of him in section 71(1)(b). The information that a debt counsellor must receive, in pursuance of this assessment, is also set out in R 24.

[21] The application before me has no information in the vein sought by R 23A and R 24, to enable me to venture into a full investigation of the applicant's financial position. What is worse, is that R 24(3) requires of a debt counsellor who does an assessment to verify the information provided to him or her by requesting documentary proof from the consumer, contacting the relevant credit providers or employer or any method of verification of the information considered. The investigation of the affordability assessment on the existing means and prospects

has been deliberately placed outside the High Court as a first instance forum by the Legislature. It has been left to the debt counsellor, the NCR, the Tribunal and the Magistrate's Courts.

[22] It follows that I am not in agreement with Mr Rogowski that the silence of the NCA on any process to have a person declared no longer over-indebted by a Magistrate's Court is a lacuna in the NCA. In my view, it is a deliberate decision by the Legislature, against the background of the nature of the work that a debt counsellor has to do as introduced by the amendments brought about by the National Credit Amendment Act 19 of 2014. Where circumstances like the present emerge, where the debt counsellor is unable or unwilling to do the research envisaged for him or her to assess whether the financial position of the consumer warrants him or her to issue a clearance certificate, the Legislature decided that such research be left to the Tribunal. The Tribunal has the power to make any other appropriate order required to give effect to a right, as contemplated in the NCA or the Consumer Protection Act, 68 of 2008 [s 150(i)]. This, in my view includes the power to refer the matter to the NCR for a full investigation. On the other hand, the NCR has the right to apply to the Tribunal in the prescribed manner and form for an order resolving a dispute over information held by a credit bureau, in terms of Part B of Chapter 4 [s 137(1)].

[23] There is a further worrying aspect in this matter which remains unexplained by the applicant. In my view, it is an aspect that relates to the fourth path that was available to him. His application to the first respondent for his obligations to be re-arranged was only made in November 2016. This is long after the Supreme Court of

Appeal in *Nedbank Ltd and Others v The National Credit Regulator and Another* 2011 (3) SA 581 (SCA) at paragraph 29 had already said:

"[29] … A court is empowered to modify the wording of a statute where it is necessary to give effect to what was the true intention of the legislature. This power will readily be exercised where there are other indications in the legislation supporting the correction. In terms of s 86(7)(c) the debt counsellor may "issue a proposal" that the Magistrate's Court make certain orders. It is not said that he 'must' do so but, given his duty in terms of subsec (6) and his position as statutory functionary, he 'must' issue the proposal. If the contentions of Juselius were to be accepted it would remain uncertain, in cases falling under s 86(7)(c), from where the Magistrate's Court, to which the matter has been referred, would derive its power to make any of the orders set out in s 87(1)."

The applicant, in my view, should have taken this court into his confidence and disclosed the true reasons as to why the first respondent did not issue a proposal recommending that the Magistrate's Court re-arrange his obligations, as the law required. This omission is material as it excluded, according to the applicant, the magistrate's powers to rescind the re-arrangement order in terms of s 36(d) of the Magistrates' Courts Act 32 of 1944. The Magistrate's Court's power to rescind its own order was thereby thwarted.

[24] Whether the exclusion of the Magistrate's Court through an omission to issue a proposal for the Magistrate's Court to make an order was by design or oversight, in my view, did not totally oust the power of the Magistrate's Court to consider the applicant's case. In *Ndamase v Functions 4 All* 2004 (5) SA 602 (SCA) at para 5 it is said:

"[5] It is well-established that the magistrate's court has no jurisdiction and powers beyond those granted by the Act (compare Riversdale Divisional Council v Pienaar *(1885) 3 SC 252 at 256;* Stork v Stork *(1903) 20 SC 138 at 139;* Gqalana and Others v Knoesen and Another *1980 (4) SA 119 (E) at 120;* Mason Motors (Edms) Bpk v Van Niekerk *1983 (4) SA 406 (T) at 409E-F;* Venter v Standard Bank

of South Africa *[1999] 3 All SA 278 (W) at 280i-j) and that in this context, jurisdiction means 'the power vested in a court by law to adjudicate upon, determine and dispose of a matter' (see* Ewing McDonald & Co Ltd v M & M Products Co *1991 (1) SA 252 (A) at 256G-H;* Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board *1950 (2) SA 420 (A) at 424;* Spendiff NO v Kolektor (Pty) Ltd *1992 (2) SA 537 (A) at 551C). It is also well-established that powers may be conferred expressly or by implication. Where the Act is silent on a matter the general rule is that by expressly conferring on the magistrates' courts jurisdiction in respect of a particular matter, the Act confers by implication the ancillary powers necessary to give effect to that jurisdiction."*

The preamble to the NCA provides its object as being "to promote a fair and non-discriminatory marketplace for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information.; … to regulate credit information; …".

[25] In my view, where fresh facts have arisen since a debt counsellor's notification to all credit providers and every registered credit bureau of the consumer's application for debt re-arrangement, or, after an assessment and conclusion that a consumer appears to be over-indebted, and the new facts demonstrate a material change in the circumstances of a consumer, the Magistrate Court's power to find that the consumer is not over-indebted is by implication, conferred when the Magistrate's Court is given the jurisdiction to entertain proposals from the debt counsellor to re-arrange a consumer's obligations or, with leave of the Magistrate's Court, a consumer applied directly to the Magistrate's Court. There is no provision in the NCA, in my view, which expressly provides that the Magistrate's Court shall have no jurisdiction to consider such proposal or application.

[26] Such an interpretation of the powers of a Magistrate's Court is in line with the preamble, and the purpose of the NCA as set out in s 3 which provides that:

"3. Purpose of the Act – The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, …"

Magistrates' Courts are generally local and inexpensive in comparison to the High Courts across the towns and cities of the Republic. In my view, the Legislature has provided in section 86 for a consumer to apply for leave where he or she is not satisfied with the response of a debt counsellor, in order for the consumer to show cause why it is desirable for the Magistrate's Court, and not the NCR or the Tribunal, to intervene. The consumer must demonstrate circumstances and reasons that show that it is necessary, in the interests of justice and equity that the investigation should shift from the statutory body to the judicial authority, in its discretion.

[27] In my view, the general thrust of the NCA, and in particular the consumer credit policy under Chapter 4, places the primary jurisdiction of consumer rights, consumer credit records and over-indebtedness and reckless credit, in the debt counsellor, National Credit Regulator, the Tribunal and the Magistrate's Courts, the latter two being subject to the supervision and inherent jurisdiction of the High Courts. The nature of the work set out for a debt counsellor, the NCR or the Tribunal in such circumstances, in my view, is necessary for a credible market place. Such an investigation cannot be avoided by simply crying lacuna and running to the High Courts, and thereby avoiding a proper investigation by the debt counsellor, the NCR or the Tribunal into the credibility of the information that sustains the alleged change in the financial position of a consumer. Under the circumstances, in my view, there is no good cause for the quantum leap out of the domestic remedies available to the

applicant by statute, into the recourse to the courts, until the final stage and until the applicant had exhausted his statutory remedies. The application to the High Court is premature.

[28] It follows, in my view, that the High Court is not the forum of first instance on matters which both the Tribunal and the Magistrate's Courts should deal with. Under circumstances where there are various tribunals which under the NCA are open to an applicant, it is preferable that the intervention of the High Court be deferred until the domestic remedies provided for in the NCA have been exhausted, unless the very complaint is the illegality or fundamental irregularity of the decision sought to be challenged (*Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A) at 501C-503H).

[29] Where the Legislature has spared the High Courts from such primary tasks as a forum of first instance in such elementary investigations, in my view, that ordination should not be departed from at the slightest invocation and for light and flimsy reasons. The applicant had an option to simply challenge the information held by the credit bureau, and if the credit bureau did not remove the information, it would have led to an investigation of his true financial position by the NCR leading up to, if needs be, the full panel of the Tribunal deciding the matter. There is no explicable reason given by the applicant as to why this path was not followed. Secondly, the refusal of the first respondent to issue the applicant with a clearance certificate is a decision that is reviewable by the Tribunal. There is no reason advanced as to why the applicant did not approach the Tribunal for intervention.

[30] I am not persuaded that the applicant is entitled to the intervention of the High Court at this stage and an order in the terms prayed for. For these reasons, I make the following order:

1. The application is dismissed.
2. The applicant is granted leave to:
   2.1 Challenge the accuracy of the information held by the credit bureau in terms of section 72(1)(c)(ii) of the NCA;
   2.2 File a complaint against the first respondent with the National Credit Regulator for the decision of the first respondent not to issue the applicant with a clearance certificate in terms of section 136 of the NCA;
   2.3 File an application for review of the decision of the first respondent not to issue the applicant with a clearance certificate as contemplated in section 71(1), to the Tribunal established in terms of section 26 of the National Credit Act 34 of 2005; or
   2.4 File an application to the Magistrate's Court for leave to apply for, and if granted such leave, to apply for the granting of an order that the applicant is not over-indebted.
3. No cost order is made.

………………………………………
DM THULARE
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant: Adv Adrian Rogowski
Date(s) of Hearing: 30 October 2017 (3rd Division)
Judgment delivered on: 17 November 2017